IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1204

ROSA RODRIGUEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
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-against-

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on the 9th day of February, 1978, which affirmed a judgment of conviction heard with a jury before the Honorable Lawrence A. Whipple in the United States District Court for the District of New Jersey and violation of:

(a) Title 21, U.S.C., Section 846 (conspiracy to possess and distribute cocaine).

Appellant was sentenced to three years in prison and three years special parole.

THE OPINION BELOW

The case was affirmed without opinion by the United States Court of Appeals for the Third Circuit. This case has not yet been reported. A copy of the order affirming the conviction is attached herein.

JURISDICTION

The Judgment of the Circuit Court of Appeals for the Third Circuit was entered on the 9th day of February, 1978. No requests have been made for extensions of time to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code.

QUESTION PRESENTED

1. Did the Government fail to sustain in its burden of proof each element of the crimes charged beyond a reasonable doubt?

2. Was the petitioner deprived of her constitutional right to a fair trial?

(a) Was the petitioner denied a fair trial by virtue of the Judge's reference to her as a *"convict"* during the Judge's charge to the jury?

(b) Was the Judge's curative instructions sufficient to eliminate prejudice against the petitioner from the jury's mind?

STATUTE INVOLVED

21 U.S.C. 846

"Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P.L. 91-513, Title II, Part D, §406, 84 Stat. 1265)."

STATEMENT OF CASE

The petitioner, Rosa Rodriguez, was tried together with her husband, Ramon Rodriguez, who makes a separate petition to this Court. On the trial against this petitioner, the only evidence received against her was the testimony of one Alejandro Andino who received immunity from prosecution upon his taking the witness stand and who admitted that he had perjured himself in a New Jersey State case involving the possession of cocaine wherein he denied that he ever used or possessed cocaine. Andino testified that the petitioner herein was present in her home when cocaine was allegedly sold by her husband Ramon Rodriguez to Andino (R.P. 1.40), and that on one occasion pursuant to the orders of her husband, she allegedly brought a quantity of cocaine and a scale into a room and then left. (R.P. 1.40-3, et seq).

According to Andino, Rosa's only other alleged connection with Andino was to answer a telephone call for her husband.

The other two witnesses, to wit: Arthur DeMarsico and Special Agent Oakley (DEA) offered no evidence against the petitioner herein.

REASONS FOR GRANTING THE WRIT

DID THE GOVERNMENT FAIL IN ITS BURDEN OF PROOF TO SUSTAIN EACH ELEMENT OF THE CRIMINAL CHARGE BEYOND A REASONABLE DOUBT?

In a trial where the Government proves that the petitioner is part of a different conspiracy than that charged in the indictment, or that there are multiple conspiracies, and that the petitioner is not a member of the multi-group, or in other words, that she is a member of a

different group, she is not guilty of the conspiracy charged in the indictment, and she must be acquitted. *U.S. v. Borelli*, 336 F.2d 376 (2d Cir. 1964).

The Supreme Court also stated that if the petitioner entered into a series of separate illegal transactions, none of which were dependent upon each other, and the petitioner had no interest in the success of the other participants, then the charge of conspiracy as alleged in the indictment herein has not been proved. *Kotteacos v. U.S.*, 328 U.S. 750.

Upon the trial it was established by the testimony of the Government's witness Andino, that in 1975, Andino met the Government's witness DeMarsico in Pink's Bar in Passaic, N.J. (R.P. 1.28), that they engaged in conversation relating to cocaine and that Andino, co-defendant DeMarsico, co-defendant Glenn Mancini, and a person named Benny, went to Brooklyn to buy cocaine. (R.P. 1.29). A conspiracy was then and there established without the petitioner knowing of its existence. Sometime thereafter, in an effort to purchase more cocaine, Andino allegedly went with DeMarsico to a bar in the Bronx, where they allegedly met the petitioner's husband (R.P. 130-131). Andino then testified that while the petitioner's husband allegedly agreed to sell Andino cocaine, he refused to sell cocaine to DeMarsico. (R.P. 131). At that point, the petitioner's husband refused to become part of the group which was engaged in the distribution of cocaine, rather it is alleged that petitioner's husband confined his illicit activities to the alleged sale of cocaine to Andino.

The record is void,of any statement by any witness that the petitioner was a party to a plan, scheme, or agreement between herself and anyone else with respect to the alleged illicit dealings in cocaine. Nowhere is there any evidence that one alleged sale by petitioner's husband to Andino was conditioned upon any further sales, rather, each transaction was separate and distinct, and not made according to any common plan or scheme. Taking the record in a

light most favorable to the prosecution, assuming but not conceding, that the petitioner's husband participated in the illegal sale of cocaine to Andino, his explicit refusal to deal with anyone else eliminated his membership in the confederation or agreement which is the very essence of the conspiracy. There was no evidence that petitioner ever agreed to sell cocaine to anyone or to join in any agreement or conspiracy.

In the case of *U.S. v. Murray*, 527 F.2d 401 (C.A. Tex. 1967), the defendants discussed sales of drugs with federal agents, sold drugs to federal agents, and met with said agents and promised to supply additional drugs. The court in *Murray* found:

> "Mere presence or association is not enough, for it to establish a person's participation in a conspiracy."

There may have been a conspiracy between Andino, DeMarsico, Mancini and Pavone to deal in cocaine, but the petitioner's husband *affirmatively refused to become a part of it*. It necessarily follows therefore, that in line with *Kotteacos, supra, Borelli, supra*, and *Murray, supra*, that the mere association with one participant in a conspiracy without the petitioner having joined the conspiracy, without having a stake in the success of the venture is insufficient to sustain conviction of the petitioner for conspiracy. *U.S. v. Di Re*, 159 F.2d 818 (2d Cir. 1947).

Where there is no evidence against the petitioner, except the co-conspirators' declarations against her, the petitioner must be acquitted. *U.S. v. Renda*, 56 F.2d 601, 602 (2d Cir, 1952), In a more recent case, it was held that even though the uncorroborated testimony of an accomplice may be sufficient to convict, where the witnesses' qualifications are so shoddy, a verdict of acquittal should be directed. *Suhl v. U.S.*, 390 F.2d 547 (C.A. 9 1968), cert. den. 391 U.S. 964, 88 S.Ct. 2035. In the instant case, the

main witness against the petitioner was given total immunity from prosecution upon the trial of the petitioner and admitted he was the instigator of the crime, and further that he committed perjury in a state case for possession of cocaine by falsely placing ownership of the cocaine, in that case, upon another person (R.P. 4.28-242).

Finally, it must be noted that the illegal transactions between Andino and the petitioner *all allegedly took place in the City and State of New York* and, therefore, the U.S. District Court of New Jersey had *no jurisdiction* over the matter and the conviction should be reversed.

Directly on point with petitioner's contention that the Court had no jurisdiction to try her, since it was not alleged that she took part in any legal transactions within the District of New Jersey, is the case of *U.S. v. Mancino*, 179 F. Supp. 897 (1960 S.D.N.Y.). In *Mancino, supra*, all illegal transactions involving drugs took place within the Eastern District of New York, and the defendant was prosecuted within the Southern District of New York. The defendant moved for a judgment of acquittal upon the grounds that the court lacked jurisdiction to try the case, since the transactions took place outside of the Southern District of New York. The court in granting Mancino's motion stated:

> "Proving proper venue is part of the Government's case, without which there can be no conviction."

The court cited *U.S. v. Bryson* (1954 D.C.N.D. Cal.), 16 FRD 431, and *Post v. U.S.* (1894), 161 U.S. 583, 16 S.Ct. 611, in support of its granting petitioner's motion for a judgment of acquittal. The Government failed to prove that the petitioner participated in any illegal acts within the District of New Jersey, therefore, the Government failed to prove that the Court had venue or jurisdiction over the petitioner and the judgment should therefore be reversed.

WAS THE PETITIONER DEPRIVED OF HER CONSTITUTIONAL RIGHT TO A FAIR TRIAL?

A. Was the petitioner denied her right to a fair trial by virtue of the Judge's reference to her as a "convict" during the Judge's charge to the jury?

When the trial judge during his charge to the jury referred to the petitioner and her co-defendant as "convicts", he suggested to the jury that the petitioner was guilty of the crimes charged, and influenced said jury in returning its verdict of guilty against the petitioner. This remark by the trial judge deprived the petitioner of her constitutional rights to a fair trial and due process of law.

Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. Calif.*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705.

> "... There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless errors." *Ibid* 87 S.Ct. at 827.

Chapman then meant *no compromise with the proposition that a conviction cannot be based to any extent on constitutional error.*

In the case at bar, the sole evidence against the petitioner was the uncorroborated testimony of one alleged accomplice, Alexjandro Andino, who testified that he saw the petitioner bring a scale and cocaine into a room where the petitioner's husband was allegedly meeting with Andino; and that petitioner had answered telephone calls from Andino.

A reading of the record indicates that the evidence at best bore great scrutiny as each of the witnesses against the petitioner received substantial consideration for his testimony and that said testimony was fraught with in-

consistency and uncertainty. Thus, although there may have been sufficient evidence to establish the petitioner's participation in the crimes charged, a jury might still have concluded that the case was not proved beyond a reasonable doubt. Certainly, the *Government must now carry its burden of demonstrating beyond a reasonable doubt that the Judge, in his charge to the jury, referring to the petitioner as a convict, did not contribute to the petitioner's conviction.* Although the Government may argue that the evidence is legally sufficient to sustain the verdict of guilt, it was not so overwhelming that it can be said that as a matter of law, the Judge's prejudicial statement could not have influenced the verdict. *Chapman v. Calif., supra.* Emotions aside, the failure to afford an accused a fair hearing violates even the minimum standard of due process regardless of the heinousness of the crime charged (*see Irvin v. Dowd,* 336 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751).

> "No one would dispute the statement that a defendant in a criminal case has a constitutional right to be proven guilty beyond a reasonable doubt before he is deprived of his life, liberty or property (U.S. Const., 5th Amdt., Section 1; N.Y. Const., Art. I; *In re Winship,* 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed. 2d 368; *La Fave & Scott, Criminal Law, Hornbook Series,* pp. 45-46; *cf. Matter of Richard S.,* 27 N.Y.2d 802, 315 N.Y.S.2d 861, 264 N.E.2d 353; *see* CPL 70.20). Unless an appellate court can say that errors committed at trial, which affected defendant's substantial rights, are harmless beyond a reasonable doubt, defendant's right to that standard of proof can be severely prejudiced, the extent of the prejudice depending upon the nature of the error in the context of other proof and the

> circumstances of the case." *People v. Crimmins,* 367 N.Y.S.2d 213.
>
> "In jury trials, the trial judge should be cautious and circumspect in his language and conduct before the jury . . . especially, he should refrain from any remarks that are calculated in any way to influence the minds of the jurors or to prejudice a litigant. Improper remarks which are prejudicial *or have a tendency to prejudice the minds of the jurors* against the unsuccessful party afford grounds for a new trial or reversal of judgment." 5 A.L.R. 3d 976. (Emphasis supplied).

The judge's characterization of the petitioner as a *"convict"* during the charge to the jury was prejudicial in that it interfered with the jury's function as finders of fact and therefore deprived the petitioner of his constitutional right to a fair trial. The judgment should be reversed and a new trial ordered.

B. Was the Judge's Curative Instructions sufficient to eliminate prejudice against the petitioner from the jury's mind?

The reviewing Court in its experience must be cognizant of the power and impact of statements contained in a trial judge's charge to the jury. The laymen sitting as jurors at the beginning of the trial are sworn to apply the law as the Court gives it to them without hesitation and without injecting their personal views as to what the law should or should not be. During the trial judge's charge to the jury, *all eyes and ears of the jurors are focused upon the judge whose very words, at that instant, are sufficient to influence the outcome of the trial.*

In this case, the judge had given his own "boiler plate" charge to the jury, and without comment, included in his charge those requests to charge which the prosecution had made and which the Court had granted. In a sudden shift of tactics, the Court chose to inform the jury that the petitioner, in fact, made requests to charge which he granted, thus, giving emphasis at that point to the fact that the charges which he was then delivering were not the Court's own creation, but those which the petitioner had requested and which he granted.

It is respectfully submitted that the mere emphasis by the judge that she had granted petitioner's requests to charge may have caused a certain reluctance in the jurors' minds to vote for acquittal because it was the petitioner's request to have the jury consider the case in light of those charges. When the trial judge then stated:

> "Now I refer to the *convicts'* request number 3." (Emphasis added). (R.P. 5.90),

the jury may reasonably have concluded that the judge decided that the petitioner was guilty of the crime and that the jury should, in fact, convict the petitioner. After the charge to the jury was completed, petitioner pointed out to the Court that the error had, in fact, taken place and that the Court referred to the petitioner as a *"convict"* (R.P. 5.96). The only curative instructions were:

> "THE COURT: Let me correct something. I understand that I used the word *'convicts'* in my instructions to you. Please disregard that entirely. That has no place in this case at all, and no inference against either one or both of these defendants is to be drawn by virtue of that. The Court committed an error. I apologize for that."

This instruction was insufficient to erase from the jury's mind that the indication by the Court that the petitioner was a *"convict"* or should be convicted and the Govern-

ment must prove beyond a reasonable doubt that the judge's reference to the petitioner as a *"convict"* did not affect the jury's verdict in convicting the petitioner.

It is respectfully urged that rather than curing the prejudicial error, the judge's instruction gave emphasis to the word *"convict"* at a crucial point in the trial and may have been the most influential factor in the jury's reaching its verdict.

> "Cautionary instructions do not cure a comment of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence.' *Quercia v. U.S.*, 289 U.S. 466, 472, 53 S.Ct. 698, 700, 77 L.Ed. 1231 (1933)"

Another inference may be reasonably drawn from the circumstances. In the case at bar, the petitioner chose not to take the witness stand on her own behalf as the Court well knows is her constitutional right. The jury may have concluded that when the Court referred to the petitioner as a *"convict"*, the reason the petitioner did not take the stand on her own behalf was because she had been previously convicted of a crime and did not want to allow the jury to hear inquiries with respect to her previous criminal record. This very thought entering the jury's mind would have entered into their deliverations and most probably operated to the detriment of the petitioner. The judge's characterization of the petitioner as a *"convict"* is of a "sort most likely to remain firmly lodged in the memory of the jury, and to excite or prejudice it precluding a fair and dispassionate consideration of the evidence". *Quercia v. U.S., supra; Star v. U.S.*, 153 U.S. 614 (1894); *Mullens v. U.S.*, 106 Fed. 892, 895; *Wallace v. U.S.*, 291 Fed. 972; *Leslie v. U.S.*, 43 F.2d 288, 289.

In the instant matter where the conviction was based upon the uncorroborated testimony of an accomplice, who was a self-admitted perjurer, and where there was no independent evidence of drugs introduced at the trial, it must be said that the record is not overwhelmingly indicative of guilt. It is not unreasonable to state after a review of the entire record that at the time the judge was instructing the jury, the guilt or innocence of the petitioner was a question which was not easily resolvable in the jury's mind.

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." *Glaser v. U.S.*, 315 U.S. 60 (1942), at p. 67.

In the Third Circuit, in a case nearly paralleling the case at bar, the trial judge in an income tax evasion case stated:

> "The people of this State and of the United States are entitled to be assured of this conviction."

This Court in reversing the conviction treated the judge's statement as an expression of his opinion that the accused was guilty and that the comment was prejudicial to the accused. *U.S. v. Link*, 202 F.2d 592 (C.A. 3 1953). Also see *Bihn v. U.S.*, 328 U.S. 633, 66 S.Ct. 1162.

The highest court in New York State, the Court of Appeals, in considering the weight to be given cautionary or curative instructions stated:

> "Such instructions are easy to give, but hard to follow." *People v. Marshall*, 306 N.Y. 223 (1954), 117 N.E.2d 265.

To the same effect, Judge Learned Hand wrote in *Nash v. U.S.*, 54 F.2d 1006, 1007:

> "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."

The petitioner's right to a fair trial having been denied, the judgment should be reversed and a new trial ordered.

CONCLUSION

The questions presented by this case are a great and recurring significance in the administration of justice as it applies to defendants in criminal cases, genuinely and specifically to those who have been charged with violations of drug laws involving cocaine. The serious questions of criminal justice and public policy involved herein and the effect of the decision below, if not reversed, upon the historic responsibility of the courts to provide fair and equal justice under the law, make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARTIN J. SIEGEL
Attorney for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Office of the

NOTICE OF ENTRY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Office of the Clerk

NEWARK 07102

UNITED STATES OF AMERICA

-vs-

ROSA RODRIGUEZ

Cr. 76-444

There was entered on the docket on Feb. 2, 1978 aa certified copy of Judgment Order of U.S.C.A. in lieu of mandate affirming Judgment of the District Court.

ANGELO W. LOCASCIO, Clerk

cc: U.S. Attorney
U.S. Probation
U.S. Marshal

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1464

UNITED STATES OF AMERICA

vs.

RODRIGUEZ, ROSA,

Appellant.

(D.C. Crim. No. 76-444-2)

On Appeal from the United States District Court
For the District of New Jersey

Submitted Under Third Circuit Rule 12(6)
January 6, 1978

Before GIBBONS, GARTH, *Circuit Judges*, and WEINER,* *District Judge*

Jonathan L. Goldstein, United States Attorney
Ralph A. Jacobs, Assistant United States Attorney
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Attorney for Appellee

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*Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT ORDER

In this appeal from a judgment of sentence for violation of 21 U.S.C. §§841 and 846, defendant Rosa Rodriguez contends:

(1) that there is insufficient evidence to sustain the jury verdict;

(2) that she was deprived of due process by the court's inadvertent reference to "convicts" and that the prejudice caused by this misstatement was not dissipated by the curative instruction which was given.

We find no merit in these contentions.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court
s/John J. Gibbons, Circuit Judge

Attest
s/Thomas F. Quinn, Clerk

Dated: Jan. 9, 1978

Certified true copy by THOMAS F. QUINN

INDICTMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 76-444

Title 21 U.S.C. §§841(a)(1); 846
Title 18 U.S.C. §2

UNITED STATES OF AMERICA

v.

RAMON RODRIGUEZ, a/k/a RAMIN, ROSA RODRIGUEZ, JUAN PRADO, ARTHUR DE MARSICO, CYNTHIA BEGGS, GLEN MANCINI, MICHAEL PAVONE

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1

That between on or about September 1, 1975, to on or about March 1, 1976, the exact dates being unknown to the Grand Jury, at Clifton, in the District of New Jersey, and elsewhere, the defendants

RAMON RODRIGUEZ
a/k/a RAMIN
ROSA RODRIGUEZ

JUAN PRADO
ARTHUR DE MARSICO
CYNTHIA BEGGS
GLEN MANCINI
MICHAEL PAVONE

knowingly and wilfully did combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to knowingly possess with intent to distribute and to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

COUNT II

That between on or about September 1, 1975, to on or about March 1, 1976, the exact dates being unknown to the Grand Jury, at Clifton, in the District of New Jersey, and elsewhere, the defendants

RAMON RODRIGUEZ
a/k/a RAMIN
ROSA RODRIGUEZ
JUAN PRADO
ARTHUR DE MARSICO
CYNTHIA BEGGS
GLEN MANCINI
MICHAEL PAVONE

did knowingly possess with intent to distribute cocaine, a Scjedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.